

***United States Court of Appeals
for the Second Circuit***

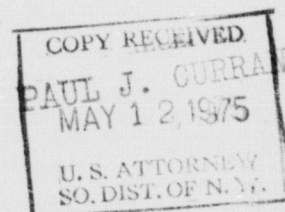


**APPELLANT'S
BRIEF**

To Be Argued By
GARY P. NAFTALIS

PAS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



75-1077

UNITED STATES OF AMERICA,

Appellee,

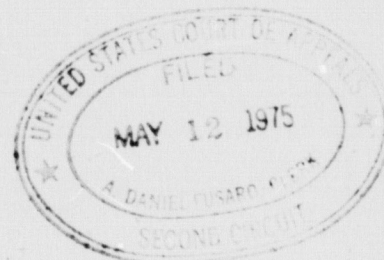
- against -

WILSON TORRES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

- against -

Docket No. 75-1077

WILSON TORRES,

Defendant-Appellant.

-----x

On Appeal from the United States District
Court for the Southern District of New York

BRIEF FOR APPELLANT

Questions Presented

1. Whether the conviction must be reversed because a prior consistent statement of the Government's principal witness was improperly received in evidence in a case which turned on the credibility of that witness?
2. Whether the verdict must be set aside because the redirect examination of the Government's principal witness inaccurately described that witness' testimony in a prior trial?

Preliminary Statement

Wilson Torres appeals from a judgment of conviction entered on March 11, 1975, in the United States District Court for the Southern District of New York after a two day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 72 Cr. 391 charged appellant in one count with conspiracy to violate the federal narcotics laws in contravention of Title 21 U.S.C. §§841 and 846. Trial commenced on March 25, 1974, before Judge Wyatt and a jury, and on March 27, 1974, the jury returned a verdict of guilty. On May 17, 1974, Judge Wyatt sentenced the appellant to one year imprisonment.

On appeal, this Court unanimously reversed Mr. Torres' conviction and held his trial was unfair because the Government improperly impeached its own witness with a prior statement not related to the crime on trial and by calling an Assistant United States Attorney as a witness, and by improper statements by the prosecutor in summation. 503 F.2d 1120 (2d Cir. 1974).

On March 10, 1975, Mr. Torres was retried and on March 11, 1975, the jury returned a verdict of guilty, and Judge Wyatt reimposed the sentence of one year's imprison-

ment. Mr. Torres is presently serving that sentence.

Statement of Facts

The Government's case at trial rested essentially upon the testimony of one witness, New York City police officer Jose Guzman.

Detective Guzman testified that, while acting in an undercover capacity, he purchased one ounce of heroin for \$1,000 on January 18, 1972, from Jose Sanjurjo and Hector Ortiz, in the vicinity of 2353 Second Avenue in Manhattan* (Tr. 33-38). This was the only sale of narcotics that occurred in the instant case and it is undisputed that the appellant Wilson Torres had nothing whatsoever to do with this transaction (Tr. 50-51).

Guzman further testified that, approximately one month later, on February 14, 1972, he unsuccessfully attempted to make a second purchase of narcotics from Jose Sanjurjo (Tr. 52). On that night, Guzman went to the vicinity of 121st and Second Avenue and negotiated with Hector Ortiz, Jesus Sanjurjo** and Jose Sanjurjo to purchase 1/8 kilogram of heroin for \$3,600 (Tr. 38-43). Wilson Torres did not participate in these negotiations (Tr. 54-6).

*Ortiz and Sanjurjo were also named as defendants in the instant indictment and plead guilty.

**Jesus Sanjurjo, who was the brother of Jose Sanjurjo, was also a defendant in this case and was convicted in a separate trial.

The first time Guzman ever met Wilson Torres was later in the evening of February 14, 1972, when Torres entered Guzman's car in which Hector Ortiz and his wife Lillian were also present. Torres told Guzman to drive to 120th Street and First Avenue where Guzman "would get the package." According to Guzman, either Torres or Lillian Ortiz (he wasn't sure which one) stated that the "connection had to be careful because it was a small package" and that Jesus Sanjurjo would follow them to make certain that the police weren't following them. At 120th Street and First Avenue, Wilson Torres and Lillian exited the car and stated they would return shortly. Later that evening, on 96th Street and Second Avenue, Torres returned to Guzman's car and stated that he was going to "bring the material in a little while." Torres then left and never returned. No heroin was sold to Agent Guzman (Tr. 43-47).

Having failed in his attempt to purchase narcotics on February 14, 1972, Guzman returned to 2353 Second Avenue on February 22, 1972, to make another attempt to buy drugs. Guzman observed Jesus Sanjurjo and Wilson Torres sitting in a white car and Guzman motioned to Jesus Sanjurjo (not to Torres) to come to his car and Sanjurjo did, while Torres remained in his car. Guzman then told Jesus Sanjurjo (outside the presence of Wilson Torres) that he wanted to buy

one ounce of heroin. Sanjurjo told Guzman to return later that evening. When Guzman returned later that night, Jesus Sanjurjo never showed up and once again no narcotics were purchased (Tr. 48-50).

On cross-examination it was established that Guzman had never included in his detailed contemporaneous report of the events of February 14, 1972 (GX 3502) two of the conversations that he claimed he had with Torres (Tr. 62-64). Similarly, when Guzman testified in a prior trial of the defendant Jesus Sanjurjo and was questioned about the events of February 14, 1972, he never mentioned one of the conversations he allegedly had with Torres (Tr. 64).

New York City policeman John Miller testified that he conducted a surveillance of policeman Guzman on February 14 and 22, 1972. During his surveillance on the evening of February 14, 1972, Miller observed Guzman and Wilson Torres together for a total of only two minutes. Miller did not overhear any conversation that Guzman and Wilson Torres had that evening (Tr. 103-4). Contradicting Guzman's testimony, Miller testified that he did not see Wilson Torres during his surveillance of Guzman on February 22, 1972 (Tr. 104).

State Trooper Lawrence McDonald testified that he also conducted a surveillance of Officer Guzman on the

night of February 14, 1972. McDonald observed Wilson Torres and Officer Guzman together for a total of only one minute (Tr. 116-117).*

The appellant Wilson Torres did not testify in his own behalf and no defense witnesses were called.

POINT I

REVERSIBLE ERROR WAS COMMITTED
BY THE GOVERNMENT'S INTRODUCTION
OF PRIOR CONSISTENT STATEMENTS BY
THE WITNESS GUZMAN ON REDIRECT
EXAMINATION

The Government's case at trial rested almost exclusively on the testimony of New York City policeman Jose Guzman regarding his conversations with Wilson Torres on the evening of February 14, 1972. Without Guzman's testimony, there simply would have been no case. Guzman was the only witness who testified as to any conversation with Torres regarding narcotics. Indeed, this Court recognized in its prior opinion reversing appellant's conviction that Guzman's testimony was "the main evidence on which the Government relies" and absent the errors that occurred in the first trial, the case "would have turned almost completely on the credibility of Guzman's testimony." 503 F.2d at 1126-27.

*The Government also introduced evidence that Torres was a fugitive from the time of his arrest until he was found approximately 2 years later in Puerto Rico.

Hence the pivotal issue in the retrial was Guzman's credibility. On cross-examination it was established that Guzman's trial testimony was inconsistent with his contemporaneous report of investigation dated February 16, 1972, which did not include certain conversations with Torres which Guzman now claimed occurred (Tr. 62-4). Moreover, Guzman's trial testimony was also inconsistent with the testimony he had given at a prior trial of co-defendant Jesus Sanjurjo in 1972 -- three years earlier. In that trial, Guzman had not mentioned a particularly important conversation with Torres which Guzman now claimed occurred (Tr. 63-4). See, United States v. Torres, 503 F.2d at 1126-27.

In order to blunt the effectiveness of this cross-examination, the prosecutor on redirect examination read into evidence a portion of Guzman's testimony given one year earlier at Torres' first trial, at which Guzman recounted the conversation with Torres that he had not included in his testimony three years earlier at the co-defendant Sanjurjo's trial (Tr. 72-76). This was plainly improper for this testimony was a prior consistent statement and rank hearsay. The sole purpose of the offer was to dilute Guzman's cross-examination by telling the jury that Guzman had testified consistently in the past. Since the prior consistent statement did not antedate any claimed motive of Guzman to fabri-

cate and, indeed had been made at the prior trial of the very same accused, its admission constituted reversible error.

In the leading case of United States v. Sherman, 171 F.2d 619, 621-2 (2d Cir. 1948), cert. denied, sub. nom. Grimaldi v. United States, 337 U.S. 931 (1949), this Court per Learned Hand, J., reversed a conviction where a prior consistent statement had been admitted to rehabilitate the impeached witness. In Sherman, supra, an accomplice witness was impeached on cross-examination with a statement he had made to the FBI which did not mention the defendant. On redirect, the Government sought to rehabilitate the witness by introducing a statement he made to the FBI a few weeks later in which he told the same story that he told at trial. This Court held that it was reversible error to admit this prior consistent statement since it did not antedate the witness' motive to fabricate.

Similarly, in Felice v. Long Island Railroad Company, 426 F.2d 192 (2d Cir.), cert. denied, 400 U.S. 820 (1970), a railroad employee sued his employer under the F.E.L.A. stating that he slipped on a grease patch in his place of employment while lifting a heavy object. The defendant put into evidence statements made by the plaintiff to the attending doctor in which he attributed the cause of

his injury to lifting heavy objects, omitting anything about slipping on a grease patch. To rebut this evidence, the trial court allowed the plaintiff to offer in evidence a prior consistent statement made to the same doctor. This Court held that it was error to admit the prior consistent statement since the statement did not antedate the motive to fabricate, even though it actually was earlier in time than the statements used on cross-examination to impeach.

See also, Ryan v. United States, 205 F.2d 362, 364 (2d Cir. 1953); Gruenenthal v. Long Island Railroad Company, 388 F.2d 480 (2d Cir.), rev'd. on other grounds, 393 U.S. 756 (1968); DiCarlo v. United States, 6 F.2d 364 (2d Cir.), cert. denied, 268 U.S. 706 (1925); J. Wigmore, Evidence (2d Ed.) §1124.

In the instant case, Guzman's motive to fabricate surely existed at the time he first testified against Torres. There was no claim by the defense that Guzman acquired any motive to falsify between the time of Torres' first and second trial. Indeed, it would be logically absurd if the Government could bolster Guzman's testimony at Torres' second trial by reading into evidence Guzman's testimony at Torres' first trial and thus convey to the jury the impression that Guzman had always testified in a consistent manner. In fact, the only reason that a second trial of Torres occurred

at all was because of the errors committed by the Government at the first trial. It would be anomalous if the Government which erred in the first trial and thus created the necessity for the second trial could then utilize the consistent testimony given at the first trial to render more believable the very same testimony at the retrial.*

Moreover, the manner in which the prosecutor offered this prior consistent testimony even further enhanced its prejudicial impact. The Assistant United States Attorney conveyed the inaccurate impression to the jury that Guzman had been cross-examined by defense counsel about his testimony regarding this conversation in Torres' first trial.

"Q. You were also asked about another proceeding about a year ago, Detective Guzman. Let me ask you if you were asked these questions and gave these answers..."
(Tr. 72)

* * *

"Q. Mr. Guzman, you were asked by Mr. Naftalis about your testimony in a proceeding about a year ago?

A. Yes, sir.

Q. And he asked you whether or not you included in that testimony your conversation with Wilson Torres in the car while you were driving from 100th Street and

*There can be no claim that this testimony was admissible under the "completeness" doctrine. Defense counsel never impeached Guzman's testimony as to these conversations with his version given at Torres I. Defense counsel made but two brief and totally unrelated references to Guzman's testimony at trial I. (Tr. 61-63). See, McCormick, Evidence §56 (1972).

1st Avenue to 120th and Second Avenue.

MR. NAFTALIS: Your Honor, I object to that as a misstatement. That was a reference to the 1972 transcript, [the Jesus Sanjurjo trial] Your Honor.

THE COURT: All right, I will sustain the objection as to form. Just go ahead and ask him a question. Don't attempt to describe or characterize what Mr. Naftalis asked him. Just read it in the terms of the prior proceeding.

Q. Were you asked these questions and did you give these answers?"

[The Assistant United States Attorney then read into evidence Guzman's testimony regarding this conversation from the first Torres trial.] (Tr. 74-6)

The clear effect of the Assistant United States Attorney's questioning was to mislead the jury in two important respects:

(1) that defense counsel had in fact cross-examined Guzman about his testimony regarding this conversation in Torres' first trial; and

(2) that defense counsel had intentionally omitted the consistent part of Guzman's response at that prior trial and that there was in fact no inconsistency between Guzman's trial testimony and the prior testimony he had given.

Thus, the jury was given the inaccurate impression by the prosecutor that defense counsel's cross-examination

was disingenuous and that defense counsel had tricked the jury into believing that Guzman had given inconsistent testimony in the past. Since Guzman's credibility was the central issue at trial, the prosecutor's questioning not only magnified the error caused by the admission of the prior consistent statement, but also unfairly discredited the defense counsel's cross-examination in the eyes of the jury. This, too, was improper, particularly where the jury's assessment of Guzman's credibility was dispositive of Torres' guilt or innocence. Cf. Giglio v. United States, 405 U.S. 150, 153 (1972); United States v. Seijo, Dkt. Nos. 74-2313, 74-2346, Slip Op. P. 3039 (2d Cir. April 23, 1975); Napue v. Illinois, 360 U.S. 264, 269 (1959).

POINT II

THE JURY WAS MISLED REGARDING GUZMAN'S TESTIMONY AT THE PRIOR TRIAL OF CO-DEFENDANT JESUS SANJURJO

As noted in Point I, supra, Guzman was cross-examined regarding his report of investigation and the testimony he had given at the prior trial of co-defendant Jesus Sanjurjo. This cross-examination established that an important inculpatory conversation that he claimed he had with Torres was not mentioned in his report of investigation nor in his testimony at the Jesus Sanjurjo trial. On redirect examination of Guzman, the prosecutor asked the following questions:

"Q. In the trial in which you testified where the defendant on trial was Jesus

Sanjurjo, were you asked for your conversations with Wilson Torres?

A. No, sir.

Q. But it's true, isn't it, that you did testify about at least part of your conversations with Wilson Torres?

A. Yes, sir."

(Tr. 71)

This testimony misled the jury into believing that in the Jesus Sanjurjo trial, Agent Guzman had not been asked about his conversations with Wilson Torres on the evening of February 14, 1972. This was simply not so. In fact, Agent Guzman testified in detail at the Jesus Sanjurjo trial regarding the events of February 14, 1972, and to the very same conversations that he had testified to at the Torres trial with the single exception of one inculpatory conversation with Torres which defense counsel claimed was a fabrication.

This redirect examination was error. Moreover, it was a repetition of what occurred at Torres' first trial. In the first Torres trial, Guzman was cross-examined in the same manner and the Assistant United States Attorney attempted the same sort of rehabilitation. On appeal, this Court wrote:

"On cross-examination of Guzman it was established that inculpatory conversations

Guzman claimed he had with Torres or in his presence were neither in his report of investigation made two days after February 14 nor mentioned in his testimony at a prior trial of codefendant Jesus Sanjurjo....On redirect the prosecutor asked Guzman whether he had been asked at the trial of Jesus Sanjurjo about the conversations with Torres, and he replied that he had not, and that he had testified to conversations with Jesus Sanjurjo at Jesus' trial which conversations he had not recounted in detail at the trial below. In fact, the transcript of the Jesus Sanjurjo trial shows that agent Guzman testified in detail regarding the events of February 14, 1972, and those details were the very same, and included the same conversations, that he had testified to at the Torres trial with the exception of the single 'burning' conversation with Torres (or in his presence)."

(503 F.2d at 1126-27)

Thus, the Government was put on explicit notice by this Court that this redirect examination conveyed an inaccurate impression to the jury. Yet, at the retrial of this very case, the Assistant United States Attorney again engaged in precisely the same kind of redirect examination and elicited the same inaccurate response. The Government is obligated to present truthful and accurate testimony and to correct its witness' testimony if it is not accurate. No such correction was made and this was reversible error. See Giglio v. United States, supra, 405 U.S. at 153; Napue v. Illinois, supra, 360 U.S. at 269; United States v. Seijo, Dkt. Nos. 74-2313, 74-2436, Slip Op. 3039 (2d Cir. April 23, 1975); Alcorta v. Texas, 355 U.S. 28 (1957); Curran v.

Delaware, 259 F.2d 707, 713 (3d Cir. 1958).

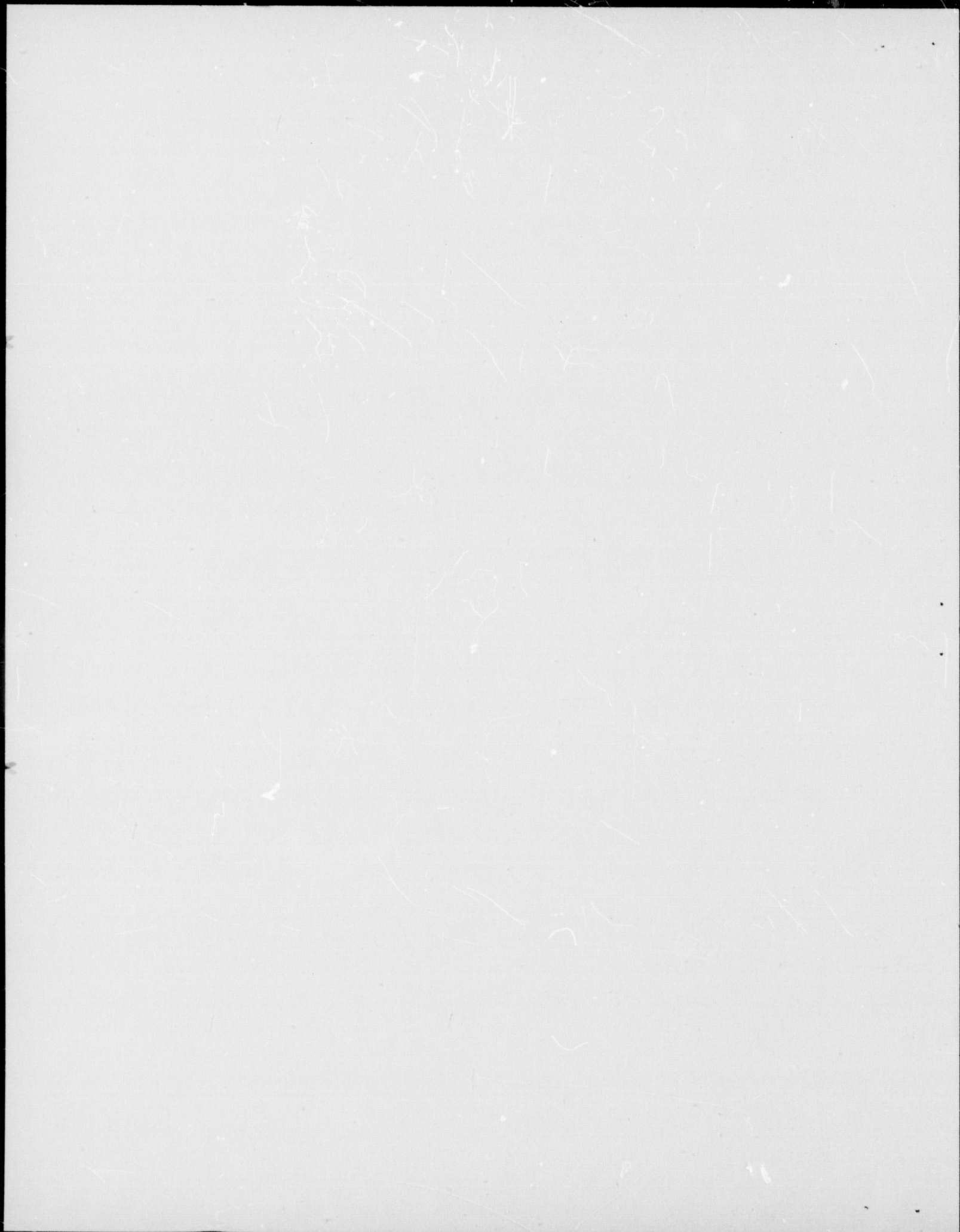
Guzman's inaccurate testimony not only was not corrected but was utilized by the prosecutor in summation to explain away inconsistencies between Guzman's testimony at the Sanjurjo trial and in the instant case.

"Okay, don't forget here that the focus is on Jesus Sanjurjo. That is what the trial is all about. Detective Guzman is trying to be as careful as he can, is giving testimony against Jesus Sanjurjo. He is not asked what was your conversation with Wilson Torres. In this case, in all the testimony, we tried to put the focus or the spotlight on Wilson Torres. He is the man on trial. We want to focus on what he did." (Emphasis added.)

(Tr. 180-1)

This, of course, was not accurate since Torres was charged with conspiracy and Guzman had testified in detail at the Sanjurjo trial about the events of February 14 and his conversations with Wilson Torres and all other alleged participants in the conspiracy. United States v. Torres, 503 F.2d at 1127. The prosecutor's summation thus compounded the error and made it even more prejudicial.

The misimpressions conveyed to the jury both in the redirect examination of Guzman and in the prosecutor's summation were of critical importance since Guzman's credibility was the key issue at trial and defense counsel's



attack on Guzman's credibility had focused on his failure on prior occasions to relate conversations that he now claimed he had with Torres. Hence Guzman's credibility was improperly bolstered and Mr. Torres was denied a fair trial.

Conclusion

The credibility of Police Officer Guzman was the central issue at trial. The introduction of Guzman's prior consistent statement improperly bolstered his credibility and constituted reversible error. Similarly, the inaccurate testimony by Guzman about his prior testimony at the trial of the co-defendant Sanjurjo also unduly and improperly enhanced Guzman's believability. Each of these grounds is sufficient to constitute prejudicial error. Certainly the cumulative effect of these errors was to deprive Mr. Torres of a fair trial. Thus the conviction must be reversed and a new trial ordered.

Dated: New York, New York
May 9, 1975.

Respectfully submitted,

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